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Supreme Court of the United States

OCTOBER TERM, 1956.

No. 593

WALTER L. DAVIS,

Petitioner,

versus

STATE OF MISSISSIPPI,

Respondent.

PETITION FOR CERTIORARI.

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Jackson, Mississippi.

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No. .....

WALTER L. DAVIS,

Petitioner,

versus

STATE OF MISSISSIPPI,

Respondent.

PETITION FOR CERTIORARI.

Now comes Walter L. Davis, Petitioner, and presents this, his petition for writ of certiorari to review the judgment of a state court, to-wit: The Supreme Court of Mississippi, and, petitioning respectfully shows the following.

1.

(a) The trial court (Circuit Court, Leflore County, Mississippi) in which petitioner was convicted of embezzlement by a jury, did not render an opinion but the judgment of conviction and sentence thereon appears at page 448 of the record. The opinion delivered by the Supreme Court of Mississippi, on appeal is reported in 87 So. 2d at page 900, but is not yet reported in the

official Mississippi Reports. No opinion was rendered by the Supreme Court of Mississippi on overruling the Suggestion of Error, but the judgment thereon appears on page 457 of the record. A copy of the opinion affirming the judgment of the trial court is appended hereto.

(b) It is urged that the conviction of the defendant is in violation of his Constitutional rights guaranteed by the Fourteenth Amendment, in that:

The overruling of defendant's demurrer to the indictment deprived him of Constitutional rights guaranteed by the Fourteenth Amendment (first) because the indictment fails to allege extraneous matters so as to inform the defendant of the nature and cause of the crime charged against him, and fails to set out such facts as are necessary to prevent the application of the Statute to any acts other than those made unlawful, (as alleged under ground 3 of demurrer, Rec. Page 4), (secondly) the said indictment is materially defective in failing to properly describe the contract referred to in the indictment; it fails to allege the date of the contract mentioned and described therein, whether the contract is oral or written, specific or implied, and fails to set forth the purpose, nature, grounds and reasons for said contract, and fails to allege such facts as are necessary to show that the acts alleged in said indictment constitute an offense under the provisions of Section 2118 of the Mississippi Code of 1942, (as charged in second ground of the demurrer and shown on pages 4 and 5 of the record), and (thirdly) that the said indictment fails to allege any crime known to the law.

Further, the trial court denied to defendant Constitutional rights protected by the Fourteenth Amendment when it overruled (order found on p. 451 of record) his motion made at the conclusion of the State's testimony, to exclude the evidence and instruct the jury to find a verdict for the defendant (Ground 4 of Motion. Rec. 449) and in overruling defendant's like motion made at the conclusion of all of the evidence (Ground 5 of Motion. Rec. 449) and in refusing to grant the defendant peremptory instruction No. 1 (Rec. page 10) requested by him (Ground 6 of Motion. R. 450) and in granting instruction No. 1 granted the state (Rec. 11).

(i) The judgment of the Circuit Court affirmed on appeal by the Supreme Court of Mississippi and sought to be reviewed is not dated but was rendered at the November, 1955 term of said Circuit Court (Rec. 448). The judgment of the Supreme Court of the State of Mississippi affirming the judgment of the trial court is dated June 11, 1956, and was entered on the same date (R. 455).

(ii) The order of the Supreme Court of Mississippi overruling the Suggestion of Error filed by defendant in said court is dated June 28, 1956 (Rec. 457). The order of the Supreme Court of the United States granting an extension of time for 30 days within which to petition for certiorari is dated September 24, 1956. Subsequent extension dated October 24, 1956.

(iii) It is believed that Title 28, Sec. 1257(3) U.S.C.A; June 25, 1948, C. 646, 62 Stat. 929 gives to the Supreme Court of the United States the right to review a decision

of the highest court of a state where, as here, there is drawn in question a right, privilege or an immunity claimed under the Constitution and particularly under the Fourteenth Amendment thereof.

(c) The questions presented for review are as follows:

(1) Where a citizen of the United States is convicted of crime in a state court on an indictment that fails to allege material extrinsic matters that are necessary in order to inform him of the nature of the crime charged, does this illegal act of the state court constitute such a denial of equal and impartial justice under the law as to constitute a denial of the Constitutional right of due process guaranteed to him by the Fourteenth Amendment?

(2) Where a citizen of the United States is convicted of crime in a state court on an indictment that fails to adequately describe a contract referred to in the indictment, so as to inform him as to what particular contract is referred to so as to enable him to prepare his defense against the charge, does this illegal act of the state constitute such a denial of equal and impartial justice under the law as to amount to a denial of due process and bring the state court's action within the condemnation of the Fourteenth Amendment and constitute a violation thereof?

(3) Where a citizen of the United States is convicted in a state court and sentenced to imprisonment under an indictment that fails to charge any crime known to the

law, does this illegal act of the state court constitute such a denial of equal and impartial justice as to violate due process and bring the conviction within the condemnation of the Fourteenth Amendment?

(4) When a citizen of the United States is indicted for the crime of embezzlement and the state's proof shows that defendant did not lawfully come into the possession of the property and that the crime, if any, is larceny and defendant, at the close of the State's case moves to exclude the state's evidence and direct a verdict of not guilty and again makes the same motion at the close of all the evidence, and said motions are respectively overruled by the state court, does not this illegal action on the part of the state court constitute such a denial of equal and impartial justice under the law as to amount to a denial of due process in violation of the Fourteenth Amendment?

(5) When a citizen of the United States is indicted in a state court on a charge of embezzlement and all of the evidence in the case establishes without dispute that the defendant did not lawfully come into possession of the property and that the crime, if any, is larceny, and the defendant requests the court to grant a peremptory instruction, instructing the jury to find him not guilty and the court refuses to grant same, doesn't this illegal act of the state court constitute such a denial of equal and impartial justice under the law as to amount to a denial of due process in violation of the Fourteenth Amendment?

(6) Where a citizen of the United States indicted in a state court for embezzlement charging that the defendant received from Lawrence Warehouse Company 1000 cases of beer, the property of the warehouse company and that said beer was delivered to defendant under a contract or agreement that defendant would transport said beer to the manufacturer thereof and exchange it for a like quantity of new beer and would return the new beer to the Lawrence Warehouse Company at its warehouse in Greenwood, Leflore County, Mississippi, in which county the indictment was returned and the trial had, and further charging that the defendant did not deliver the beer to the manufacturer thereof and did not exchange it for new beer but appropriated the beer to his own use and where the undisputed evidence showed that Lawrence Warehouse Company had one warehouse in Greenwood, Leflore County, Mississippi, and had another warehouse at Leland, Washington County, Mississippi, and that beer was removed by defendant from both warehouses, and where, under Section 26 of the state Constitution it is required that the trial be held in the county where the offense was committed, and where the state court gave to the jury an instruction that did not limit them to a consideration of only the beer removed from the Greenwood, Leflore County, warehouse but permitted them to also consider the beer removed from the Leland warehouse, located in Washington County, (a county other than the one where the indictment was returned and the trial had) did not the granting of such an instruction to the state constitute such illegal action on the part of the state court as to be such a denial of equal and impartial justice under the law as to amount to a

denial of due process in violation of the Fourteenth Amendment?

(d) The Constitutional provisions and statutes involved in the case are as follows:

(1) Section 2118 Mississippi Code 1942, reading as follows:

> "If any person shall fraudulently appropriate personal property or money which has been delivered to him on deposit, or to be carried or repaired, or on any other contract or trust by which he is bound to deliver or return the thing received or its proceeds, on conviction, he shall be punished by imprisonment in the penitentiary not more than ten years, or be fined not more than one thousand dollars and imprisoned in the county jail not more than one year or either."

(2) Section 26 Constitution of 1890 of the State of Mississippi, which may be found in Volume 1 of Mississippi Code of 1942 and which reads as follows:

> "In all criminal prosecutions the accused shall have a right to be heard by himself or counsel, or both, *to demand the nature and cause of the accusation*, to be confronted by the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and, in all prosecutions by indictment or information, a speedy and public trial by an impartial jury of the county where the offense was committed; and he shall not be compelled to give evidence against himself; but in prosecutions for rape, adultery, forni-

cation, sodomy or the crime against nature the court may, in its discretion, exclude from the courtroom all persons except such as are necessary in the conduct of the trial."

(3) The Sixth Amendment to the Constitution of the United States, (U.S.C.A. "Constitution" amendments 1 to 13, page 327), reading as follows:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

(4) Section One of The Fourteenth Amendment to the Constitution of the United States (U.S.C.A. "Constitution" amendments 14 to end page 2) which reads as follows:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(5) Title 28, Sec. 1257 (3) U.S.C.A., June 25, 1948, 62 Stat. 929, reading as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929."

(e) We here set out a concise statement of the case containing the facts material to the consideration of the questions presented.

The indictment in the case (Rec. 2) reads as follows:

> "INDICTMENT-G-ETT-1941 No. 17539
> THE STATE OF MISSISSIPPI
> COUNTY OF LEFLORE Circuit Court November Term, 1955
>
> "The Grand Jurors of the State of Mississippi, taken from the body of good and lawful men of said County, duly elected, impaneled, sworn and charged to inquire in and for the county afore-

said, at the term aforesaid, of the Court aforesaid, in the name and by the authority of the State of Mississippi, upon their oaths present, that WALTER L. DAVIS in said County, on the 7th day of November, 1955 did receive and obtain from the Lawrence Warehouse Company, a Corporation, 1000 cases of beer of the value of $3.00 per case, of the total and aggregate value of $3000.00, of property of said Lawrence Warehouse Company; that the said Lawrence Warehouse Company did deliver said beer to the said Walter L. Davis on and under the following contract, agreement, and conditions, to-wit: the said Walter L. contracted and agreed with the said Lawrence Warehouse Company that he would transport said beer to the Miller Brewing Company, a corporation at Milwaukee, Wisconsin, and there exchange it for a like quantity of other new beer; and that upon making this exchange he, the said Walter L. Davis, would within a reasonable time after December 8, 1954, return the other, new beer to the Lawrence Warehouse Company at its warehouse in Greenwood, Leflore County, Mississippi; that the Lawrence Warehouse Company delivered the aforesaid beer to Walter L. Davis and Walter L. Davis received said beer on the contract, agreement, and condition aforesaid; that, nevertheless, the said Walter L. Davis did not deliver the said beer to the Miller Brewing Company as aforesaid and did not return it, or any other, new beer, or any proceeds from said beer, to the Lawrence Warehouse Company at its warehouse at Greenwood, Mississippi, or at any place whatsoever, within a reasonable time after December 8, 1954, or at any time whatsoever, but did unlawfully,

wilfully, feloniously, and fraudulently appropriate said beer to his own use, contrary to Section 2118 of the Mississippi Code of 1942, and against the peace and dignity of the State of Mississippi.

(S.) STANNY SANDERS,
District Attorney."

The defendant demurred to the indictment (Rec. 10) and the three pertinent grounds are set up in grounds 1, 3 and 4 thereof, which read as follows:

"1. That the said Indictment fails to allege any crime known to the law.

3. The Indictment fails to allege extraneous matters so at to inform the defendant of the nature and cause of the crime charged against him, and fails to set out such facts as are necessary to prevent the application of the Statute to any acts other than those made unlawful.

4. The said Indictment is materially defective in failing to properly describe the Contract referred to in the Indictment; it fails to allege the date of the Contract mentioned and described therein, whether the Contract is oral or written, specific or implied, and fails to set forth the purpose, nature, grounds and reasons for said Contract, and fails to allege such facts as are necessary to show that the acts alleged in said Indictment constitute an offense under the provisions of Section 2118 of the Mississippi Code of 1942."

This demurrer was overruled by the Court (Rec. ..) and the defendant was put to trial on the indictment.

Lawrence Warehouse Company was in the business of operating bonded warehouses for the financing of inventories for its customers. The defendant was in the wholesale beer business and had warehouses in Greenwood, Leflore County, Mississippi, and at Leland, Sunflower County, Mississippi. The Leland Warehouse floor plans are shown on page 35 of the record and the floor plan of the Greenwood, Leflore County, Mississippi, Warehouse is shown on page 36 of the record.

On April 14, 1953, the defendant leased his Greenwood Warehouse to Lawrence Warehouse Company (Rec 29, et seq.) and also leased defendant's Leland Warehouse. On August 13, 1954, the Warehouse Company employed Norma Williams as its bonded manager of both of said Warehouses (Rec. 65). The warehouses were operated for handling defendant's beer inventories at each place under contract with the Bank of Leland, Leland, Mississippi, covering the Leland Warehouse, and Leflore Bank & Trust Company, Greenwood, Mississippi, covering the Greenwood Warehouse (Rec. 43-89), which provided:

> "Under no circumstances are those employees to permit the withdrawal of any merchandise from the warehouse until first advised by you in writing as to the commodities and quantity which may be delivered." (Rec. 67)

The respective banks financed eighty percent of the inventory in the respective warehouses (Rec. 113). The remaining twenty percent was financed by defendant (Rec. 113).

The undisputed testimony shows that there was no contract or agreement between the defendant and the warehouse company to deliver the beer to defendant. The contract, between the warehouse company and the respective banks above quoted prohibits any such agreement (Rec. 67).

E. L. Kibbling, district manager for the warehouse company, testified as follows:

"Q. Give us full details as you recall them of what Mr. Davis told you about how this beer happened to be absent from the Greenwood warehouse?

"A. He said that it was old beer and the Miller Brewery man had been after him to get rid of it or he was coming over and dump it, which of course he couldn't have done because he couldn't have gotten it without the warehouse receipts, and that he shipped the beer back to Milwaukee for exchange.

"Q. Did he tell you how he got the beer from your local warehouse—did he say he had consulted Mrs. Williams or do you recall?

"A. It obviously had to come through her.

"Q. Tell us what he said?

"A. I don't recall the exact words but he said they had shipped it back—that they trucked it to Memphis and that it was loaded on a barge for eventual shipment to Milwaukee without consulting us and without consulting the bank and receiving authority from the bank to handle it in that manner.

"Q. Did you ask him why he didn't notify the bank?

"A. I recall telling him we had no authority as he knew to deliver more than $1500.00 worth without checking with the bank and I went with him personally to both banks."

Again (Rec. 26) he testified:

"A. Once that goods has been pledged to the bank, it can't be released, except by the bank, the bank gives the date of delivery and instructions authorizing us to deliver up to a certain dollar valuation maximum, at which time we prepare a receipt and attempt to secure a check from the depositing company, payable to the bank. That briefly is about how the thing operates."

Again in testifying in regard to his conversation with the defendant, Kibbling, at page 93 of the record, testified:

"I brought out to him that we had no author ity no matter what his intention was to release that quantity of beer from the warehouse without the authority from the bank."

Again Kibbling testified (Rec. 96) in regard to releasing the beer to defendant: *"He had no agreement with us or the banks."*

Charles O. Butler, vice president and general counsel for the warehouse company (Rec. 153), in regard to the removal of the beer from the warehouse testified: "I asked him how he happened to do that and he said that he had an agreement with Mr. Miller (President of

Miller Brewing Co., Milwaukee, Wisconsin) to ship the beer back to Milwaukee. I said: 'What about your Greenwood manager, you had no authority.'" (Rec. 143.)

He also testified that, as counsel for the warehouse company, he filed suit against Walter L. Davis, the defendant here and his wife, Kathryn B. Davis (Rec. 174), Davis Distributing Co., Inc., Norma Williams and Suber Roberts, in the United States District Court at Greenville, Mississippi, charging that, "on the 6th, 7th and 8th of December 1954, defendant, Walter L. Davis, acting in concert with the defendants, Norma Williams and Suber Roberts, and other parties unknown to plaintiff, did willfully, maliciously, *wrongfully* and *fraudulently* take possession of said beer in said warehouses of plaintiff in said cities of Greenwood, Mississippi, and Leland, Mississippi, and convert the same to his own use and benefit. . ." (Rec. 148.)

In regard to his conversation with Norma Williams, warehouse manager, Butler testified (Rec. 164):

> "Q. Did Mrs. Williams tell you she entered into a contract to turn over the beer in the warehouse at Leland and Greenwood?
>
> "A. She didn't tell me that. She told me that she let Mr. Davis have it and he assured her it would be exchanged. She said she had worked for Mr. Davis a long time and he told her the beer was going back to Milwaukee and would be replaced with fresh beer. That is what she told me as warehouse attorney."

Again (Rec. 167) he testified:

> "Q. Did Mrs. Williams tell you she did anything other than permit the transfer of the beer from the warehouse in Greenwood and placed it in the custody of Mr. Davis?
>
> "A. No more than she permitted the trucks to be loaded."

This was all the testimony for the State regarding any contract or agreement to release the beer from the warehouse and it shows beyond dispute two things, viz: (1) There was no contract, as charged in the indictment, to release and exchange the beer, and (2) the defendant, Davis, came into possession of the beer unlawfully and without the consent of the warehouse company.

The defendant was being tried on an indictment returned in Leflore County, charging the commission of a crime in Leflore County, yet the documents in connection with the Washington County operations at Leland were admitted into evidence (Rec. pages 38, 43, 47, 50, 54, 56, 57, 59, 62, 63, 64, 65, 74, 77, 78, 83 and 85). Throughout the trial other references were made to the Washington County operation (Rec. 122, 163, 164, 168, 242).

(f) The defendant's constitutional right to be informed of the nature of the charge against him was raised by the demurrer to the indictment (Rec. 10) and the denial of right to due process was raised by the order of the court overruling the demurrer (Rec. . .).

The contract charged in the indictment was vital. No conviction could be had under the statute in the absence

of proof of a contract to exchange the beer and return the new beer to the warehouse. The total failure by the state to prove the contract, as alleged, entitled the defendant to have his motion, to exclude the evidence and direct a verdict for the defendant, sustained and the illegal action of the court in overruling it was such a denial of equal and impartial justice in law as to deny him due process as guaranteed him by the Fourteenth Amendment, and this constitutional question was raised by the action of the trial court in overruling the motion and refusing to grant the peremptory instruction (Rec. 17).

The defendant came into possession of the property without the consent of the warehouse company. There was no contract or agreement between either the warehouse company and the defendant or the bank, holding the warehouse receipts, and the defendant, agreeing to release the beer from the warehouse for shipment to Miller Brewing Company for exchange for new beer and the return of the new beer to the warehouse. Hence defendant came into possession unlawfully. He trespassed against the warehouse company and the bank when he took the beer. Hence his crime, if any, was larceny, and not embezzlement. He was entitled to the requested peremptory instruction instructing the jury to find him not guilty of embezzlement (Rec. 17) and the court's illegal action in refusing it, was such a denial of equal and impartial justice in law as to deny him due process of law as guaranteed by the Fourteenth Amendment and raised the constitutional question of a denial of his constitutional right under the Fourteenth Amendment.

(g) This section of rule 23, applies only to certiorari to review the judgment of a federal court and since we are here concerned with a review of the decision of a state court, we pass it without further comment.

(h) We submit the following as our argument amplifying the reasons relied on for the allowance of the writ of certiorari.

THE COURT ERRED IN OVERRULING IN PART THE DEMURRER TO THE INDICTMENT, AS THE INDICTMENT FAILED TO SET FORTH THE FACTS NECESSARY TO PROPERLY INFORM THE DEFENDANT OF THE NATURE AND CAUSE OF THE ACCUSATION AGAINST HIM.

Before discussing in detail the defects of the indictment, the attention of the court is directed to the fact that embezzlement was unknown to the common law, so that the statute defining the crime must be strictly construed in favor of the accused. *McInnis v. State*, 97 Miss. 280, 52 So. 634.

The Mississippi Constitution of 1890, Section 26, guarantees that the accused shall be informed of the nature and cause of the accusation against him. The principle is well set forth in the case of *Love v. State*, 211 Miss. 606, 52 So. 2d 470, where, in quoting from 27 Am. Jur., Indictments and Informations, Sec. 54, it is said:

> "It is the constitutional right of the accused, under the organic law of the nation and several

> states, 'to be informed of the nature and cause of the accusation' against him, and under these provisions, the accused is entitled to a plain statement of the charge against him."

This constitutional guarantee is intended to secure to the accused such a specific description of the offense as will enable him to make preparation for his trial, and also such identification of the offense that he may be insured against a subsequent prosecution therefor. *Cooksey v. State,* 175 Miss. 82, 166 So. 388; *Rutherford v. State,* 196 Miss. 321, 17 So. 2d 803.

The indictment was an attempt to charge a crimes under *Section 2118 of the Mississippi Code of 1942 Annotated.* That section is as follows:

> *"Embezzlement—property held in trust or received on contract.*—If any person shall fraudulently appropriate personal property or money which has been delivered to him on deposit, or to be carried or repaired, or on any other contract or trust by which he was bound to deliver or return the thing received or its proceeds, on conviction, he shall be punished. . ."

As the title of the section indicates, the subject matter of the statute is the embezzlement of property held in trust or received on contract. An analysis of the statute clearly shows that the property which is the subject of the embezzlement is personal property or money which has been delivered to one

(a) on deposit, or,

(b) to be carried, or,

(c) to be repaired, or,

(d) on contract or trust to deliver or return,

(i) the thing received, or,

(ii) the proceeds of the thing received.

A. THE COURT ERRED IN OVERRULING THE DEMURRER ON THE POINT THAT THE DESCRIPTION OF THE CONTRACT WAS INSUFFICIENT TO PROPERLY INFORM THE DEFENDANT OF THE NATURE AND CAUSE OF THE ACCUSATION AGAINST HIM.

As has been shown by the analysis of Section 2118, the existence of a contract or trust to deliver or return the property is an essential element of the statutory crime. The indictment utterly fails to specify or identify the alleged contract in any way, manner, shape, fashion or form. The date of the contract is not alleged. There is no description as to whether the alleged contract is written, oral, specific or implied. There is no identification or specification of the contract in any respect, the language of the indictment referring to a delivery of the defendant "under the following contract, agreement and conditions, to-wit: the said Walter L. Davis contracted and agreed with the said Lawrence Warehouse Company that he would transport said beer to the Miller Brewing Company, a corporation at Milwaukee, Wisconsin, and there exchange it for a like quantity of other, new beer; and

that upon making this exchange he, the said Walter L. Davis, would within a reasonable time after December 8, 1954, return the other, new beer to the Lawrence Warehouse Company at its warehouse in Greenwood, Leflore County, Mississippi; . . ."

So far as the indictment shows, the defendant could not know whether the State was relying upon the original written contract between the defendant and the Lawrence Warehouse Company; or upon correspondence between the defendant and the Warehouse Company; or upon conversations which the defendant had with representatives of the Warehouse Company; or upon some complete fabrication of which the defendant would first gain knowledge when testimony of it would be introduced. There was no identification of the contract which would permit the accused to properly prepare his defense. There was no identification of the contract which would permit the Court to determine that the one sought to be introduced in evidence is the one upon which the indictment is based. There was no identification of the contract which would permit the accused to later plead in bar of a subsequent prosecution that he had been tried for an offense based on that particular contract.

In the case of *Rutherford v. State, supra,* the indictment was held faulty for failure to properly describe the property which was alleged to have been stolen. Let us apply the statements of the court there to the point we are making in this case:

Rutherford v. State, 17 So.2d at 804

". . .The word 'quantity' is so vague, uncertain and indefinite as to give the defendant no intimiation regarding the amount of clover seed which he was accused of steal. Under such an allegation, the proof could have taken such a wide range as showing the theft of an amount of clover seed anywhere between 125 pounds and several tons. . ."

Davis

The word 'contract' is so vague, uncertain and indefinite as to give the defendant no intimation regarding the contract on which he received the property he is accused of embezzling. Under such an allegation the proof could have taken such a wide range as showing the essential contract was entered into between anyone from Adam to Prince Ranier, at any time from the beginning until the indictment was brought.

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The general reference of the indictment to the contract would have permitted the introduction of any contract which might have been made at any time by any parties, even parties unknown to the accused. The contract might have been based on dealings between the accused and the Warehouse Company when first signing the warehousing contract. It could have been based on dealings between the accused and Mrs. Williams, an employee of both the accused and the Lawrence Warehouse Company. It could have been based on the conferences between the accused and Mr. Bergeron, Field Representative of the Warehouse Company. It could have been based on a written contract to which some party had forged the name of the defendant, and of which he would first learn when the forged document was introduced in evidence.

In sharp contrast with the identification of the contract in the present case is the language of the indictment approved in *State v. May*, 208 Miss. 862, 45 So. 2d 728. The said Section 2118 of the Mississippi Code is involved in both. The *May* case referred to "an oral contract of employment" between May and the owner of the property. The contract was specified as being the employment contract between the defendant and Walker Francis, the employer. There could be no mistake in the *May* case as to the identity of the contract on which the indictment rested. In the present case, the indictment left the stage set for the introduction of contracts between any parties, of any date, character or type.

The general reference in the indictment to a contract is not sufficient to inform the defendant of the nature and

cause of the accusation against him. The point was specifically raised in the demurrer, paragraph 4. The court erred in overruling this ground of the demurrer to the indictment.

B. THE COURT ERRED IN OVERRULING THE DEMURRER ON THE POINT THAT THE DESCRIPTION OF THE PROPERTY APPROPRIATED WAS INSUFFICIENT TO PROPERLY INFORM THE DEFENDANT OF THE NATURE AND CAUSE OF THE ACCUSATION AGAINST HIM.

The indictment here is so framed that it is impossible to tell whether the beer which the defendant is accused of "fraudulently appropriate said beer to his own use." Received from the Lawrence Warehouse Company or was the beer which he had received in exchange for the beer from the Warehouse Company.

The indictment charges that the defendant did "fraudulently appropriate said beer to his own use." Reference to the indictment shows that there were two categories of beer mentioned in the prior language of the indictment, viz. the beer which was delivered to the defendant, and the beer for which the beer delivered to him was to be exchanged. It is impossible to determine with accuracy whether the defendant is charged with appropriating the beer which was delivered to him, or the beer which he had received in exchange. The "said beer" which was alleged to have been appropriated could have been either type.

The indictment should describe the property alleged to have been appropriated with reasonable certainty, and this means that the property should be so described as to individualize the transaction to such an extent that the description as laid will (1) enable the court to determine that the property alleged to have been appropriated is the subject of embezzlement, (2) show the jury that the things proved to have been appropriated are those upon which the indictment is founded, (3) reasonably inform the accused of the instance meant in conformity with the usual constitutional guaranty that persons accused of crime shall have the right to demand the nature and cause of the accusation, so that he may properly prepare his defense, and (4) be such that the judgment rendered after trial upon the indictment may be pleaded in bar of a subsequent prosecution for the same offense. See *Rutherford v. State, supra*, 18 Am. Jur. page 599, Embezzlement, Sec. 44.

The beer alleged to have been appropriated is not described with the certainty required under our laws. There is an indefiniteness about the description of the beer referred to as being appropriated which prevented the defendant from being reasonably informed so that he might properly prepare his defense. Pleading the judgment rendered on the indictment in this case as a bar to a subsequent prosecution for the offense tried in this matter would be useless. It could no more be said that the indictment was based on the fraudulent appropriation of the beer delivered by the Lawrence Warehouse Company than it could be said that the indictment was based on the appropriation of the beer for which the exchange was made.

Paragraph 3 of the demurrer charged that the indictment was faulty for failing to properly inform the defendant of the nature and cause of the crime charged against him. As the indictment failed to properly describe the beer which was alleged to have been fraudulently appropriated, the demurrer should have been sustained on this point. The Court erred in overruling this point of the demurrer.

C. THE COURT ERRED IN OVERRULING THE GROUND OF THE DEMURRER THAT THE INDICTMENT DID NOT SET FORTH SUFFICIENT FACTS TO PROPERLY INFORM THE DEFENDANT OF THE ACTS ALLEGED TO BE UNLAWFUL AND TO PREVENT THE APPLICATION OF THE STATUTE TO ANY ACTS OTHER THAN THOSE MADE UNLAWFUL.

This indictment is based on Section 2118 of the Mississippi Code of 1942, and follows closely the language of the statute. However, it fails to set forth sufficient facts to properly describe the acts which are made unlawful and to properly inform the defendant of the acts which are charged by the indictment as being with the purview of the statute. Likewise, it fails to allege sufficient extraneous facts to show that the statute is being applied to acts other than those made unlawful.

The indictment falls within the principle laid down in the decisions of which *Sullivan v. State*, (1890), 67 Miss. 346, 7 So. 275, is one of the leading cases. In that case the statute made it unlawful "for any persons to engage in prize-fighting in this state". The indictment charged

that Sullivan "did then and there, to-wit, on the 8th day of July, 1889, in the second judicial district of Marion County, Mississippi, unlawfully engage in a prize-fight with the said Jake Kilrain, to-wit, did then and there enter a ring, commonly called a 'prize-ring', and did then and there, in the said ring, beat, strike, and bruise the said Jake Kilrain, . . ."

The Court said:

> "This count is fatally defective as one charging the appellant with the offense of prizefighting. The statute neither defines the offense of prizefighting, nor declares what act done shall be a violation of its provisions. The specific offense was unknown to the common law; the participants being only punishable for an affray, riot, or assault and battery, according to the circumstances. In indictments for purely statutory offenses, it is sometimes sufficient to charge the offense by using only the words of the statute. This may be done where the language of the statute is so specific as to give notice of the act made unlawful, and so exclusive as to prevent its application to any other acts than those made unlawful. Our statute against retailing (Code, Sec. 1097), is an apt illustration of statutes of this character. It declared that 'it shall not be lawful for any person to sell any vinous or spirituous liquor in a less quantity than one pint, without having first obtained a license in the manner directed by this Act.' Here the nature and character of the prohibited act is clearly set out, and there is an exclusion of its application as to the only class of persons—licensed dealers—who may

> sell in the quantity named without guilt. But where the act prohibited does not clearly appear from the language employed, or where, under certain circumstances, one may lawfully do the thing forbidden by the literal meaning of the words of the statute, it is not sufficient to indict by the use only of the statutory words. Under such circumstances, the indictment must charge, in apt language, the unlawful act, that the defendant may be advised of the nature and character of the offense with which he is charged, and that he may, by demurrer, take the opinion of the court whether the facts charged constitute an offense."

The statute on which the indictment is based does not define "fraudulently appropriate." The acts prohibited do not clearly appear from the language of the statute. While it is true that all would agree that certain acts would constitute a fraudulent appropriation, the indictment must contain allegations of those acts, so that the court may properly determine, when the matter is presented to it by demurrer, that the acts alleged to have been done by the accused actually constitute a fraudulent appropriation. In the *Sullivan* case, there could be no serious denial that the accused had engaged in the practices condemned by the statute. But merely charging such conduct in the language of the statute is insufficient —the indictment must set forth the acts which bring the matter within the language of the statute.

In the *Sullivan* case, *supra*, the court also illustrated that some acts which might be within the literal language

of the statute were not within the eaning of the statute. The court said, at page 277 of the So. Rep:

> "A private contest between individuals, whether amateurs, or professional fighters or boxers, though it be for a prize or wager, would not be in violation of the particular statute under consideration, though the participants might be guilty of assault and battery, or of gaming. A fight or contest, under such circumstances, would be a fight because a contest determined by blows, and a prize-fight because a prize or wager would be awarded to the victor; but it would not be a prize-fight within the meaning of the statute, which prohibits such fights only as are offenses against public peace and order. Since, therefore, the appellant might fight for a prize under such circumstances as would not be violative of the statute, it is not sufficient to indict by the use of the statutory words only, but the facts, which, if proved, show him to be guilty of the statutory offense must be charged."

In Section 2118, the Legislature undoubtedly had in mind the matter of an embezzlement which would result in loss to the party entrusting the property to the accused. There is nothing in the indictment to show that the fraudulent appropriation alleged against the defendant resulted in any loss to the Lawrence Warehouse Company. On the contrary, it is possible that the indictment could be condemning the defendant for appropriating the beer to his own use by delivering it to the Leflore Bank & Trust Company, Greenwood, Mississippi, which held the warehouse receipts for the beer as security for a loan

made to the defendant, and receiving the receipts therefor from the bank. In such instance there would be an appropriation of the beer to the use of the defendant, and such appropriation would be fraudulent in that it was not in conformity with the contract upon which the beer was received. But it would undoubtedly be held that there was no crime committed, as the Warehouse Company would have suffered no loss thereby.

There might be an appropriation of the beer with intent to defraud the creditors of the defendant. Such would be a fraudulent appropriation, but certainly not indictable under Section 2118.

These possibilities well illustrate the principle laid down in the *Sullivan* case, *supra*, that since the appellant might fraudulently appropriate property "under such circumstances as would not be violative of the statute, it is not sufficient to indict by the use of the statutory words only, but the facts which, if proved, show him to be guilty of the statutory offense must be charged."

There was error by the court in not sustaining the demurrer to the indictment on the grounds set forth in paragraphs 2 and 3 thereof. The indictment failed to set forth the facts giving notice to the defendant of the acts alleged to be unlawful. The indictment failed to set out such facts as are necessary to prevent the application of the statute to any acts other than those made unlawful. The court erred in overruling the demurrer on these grounds.

D. THE COURT ERRED IN OVERRULING THE GROUND OF THE DEMURRER THAT THE INDICTMENT FAILED TO ALLEGE ANY CRIME KNOWN TO THE LAW.

On page 2 hereof we have set forth an analysis of Section 2118 of the Mississippi Code. Referring to that analysis again, we find that the delivery of the property to the accused must be either,

(a) on deposit, or,

(b) to be carried, or,

(c) to be repaired, or,

(d) on contract or trust to deliver or return,

(i) the thing received, or,

(ii) the proceeds of the thing received.

The contract alleged in the indictment to have been the basis on which delivery of the beer was made to the defendant does not fall within any of the specified categories. The alleged contract was one for the purpose of exchanging the beer delivered to the defendant.

There was no contract of deposit, or for carriage, or for repair. There was no contract to deliver or return the thing received. Instead, the contract was just the opposite —it was a contract to dispose of the thing received.

The delivery was not on a contract to sell and dispose of the property delivered to the defendant, and return to the Warehouse Company the proceeds of the property received. On the contrary, it was a contract to exchange the thing received, with the parties contemplating specifically that there would be no proceeds.

The terms of the contract as set forth in the indictment specifically and precisely show that the contract was not one of the types enumerated in the statute. As the existence of a contract or delivery of the type prescribed by the statute is an essential part of the crime defined by the statute, there can be no crime charged where the contract is not enumerated in the statute.

The court erred in overruling the ground set up in paragraph 1 of the demurrer, for the absence of the contract of the type prescribed by the statute was a fatal defect in the indictment.

The action of the trial court in overruling the demurrer denied to the defendant his right to be informed of the nature of the charges against him. This right is guaranteed to every citizen charged with crime in a federal court by the Sixth Amendment to the Constitution. (*U. S. vs. Cruickshank*, 92 U. S. 557, 23 L.Ed. 558; *U. S. v. Schneiderman*, 102 F. Supp. 87.) The same right is guaranteed in the state court by Section 26 of the Mississippi Constitution of 1890 (Vol. 1, Code 1942).

If the conviction and incarceration of a citizen of the United States in a federal court, upon an indictment that

does not sufficiently charge the nature of the crime charged against him, is so contrary to the public policy of the Nation as expressed in the Sixth Amendment to the United States Constitution and is so contrary to the fundamental ideas of fairness and justice and right as to be void as against the public policy of the United States then, if the crime be charged in the same manner and against the same defendant in a state court and conviction be likewise had, then it logically follows that such state conviction and sentence is still so contrary to the public policy of the United States and so contrary to the fundamental ideas of fairness and justice and right as to still be void.

While it has been held that Amendments 1 to 10, inclusive, to the United States Constitution were intended to operate solely on the federal government and do not apply to state courts, nevertheless, it has also been held that no state can deprive a person of equal and impartial justice under the law, without violating the provisions of the Fourteenth Amendment (*Caldwell v. Texas*, 137 U. S. 692) and due process of law within the meaning of the Constitution only when the laws operate on all alike, and no one is subject to partial or arbitrary exercise of the powers of Government (*Leeper vs. Texas*, 139 U. S. 462, 467).

The overruling of the demurrer to the indictment and the conviction of defendant upon an indictment that did not inform him of the nature of the charge against him subjected the defendant to an arbitrary exercise of the powers of government in violation of the Fourteenth

Amendment. The due process clause requires that the trial be conducted according to established criminal procedures, with an adequate opportunity to be heard in defense (16 C.J.S. Constitutional Law, Secs. 579, 591; *Rochin v. People of California*, 72 S. Ct. 205, 342 U. S. 165) and convictions cannot be brought about by methods that offend a sense of justice (*Rochin v. People of California*, 34 U. S. 165).

2.

THE REFUSAL BY THE TRIAL COURT TO GRANT THE PEREMPTORY INSTRUCTION REQUESTED BY DEFENDANT, WAS A DENIAL OF DUE PROCESS OF LAW.

The defendant requested of the court a peremptory instruction directing the jury to find him not guilty of the crime of embezzlement charged in the indictment. The refusal by the court to grant this peremptory instruction was a denial of due process for two reasons.

(a) The indictment charged that defendant received the property on contract to exchange the beer for new beer. No contract was proven as required by Sec. 2118, Code of 1942, on which the indictment was based. The allegation was material and conviction cannot be had in absence of proof of it. Due process of law was denied by court's refusal to grant requested peremptory instruction.

The indictment charged that the Warehouse Company delivered the beer to Walter L. Davis "on and under the

following contract and agreement, and conditions, to-wit: the said Walter L. Davis contracted and agreed with the said Lawrence Warehouse Company that he would transport said beer to the Miller Brewing Company, a corporation at Milwaukee, Wisconsin, and there exchange it for a like quantity of other new beer; and that upon making this exchange he, the said Walter L. Davis, would, within a reasonable time after December 8, 1954, return the other, new beer, to the Lawrence Warehouse Company at its warehouse in Greenwood, Leflore County, Mississippi, that the Lawrence Warehouse Company delivered the aforesaid beer to Walter L. Davis and that Walter L. Davis received said beer on contract, agreement and conditions aforesaid; that nevertheless, the said Walter L. Davis did not deliver the said beer to the Miller Brewing Company as aforesaid and did not return it, or any other new beer or any proceeds from said beer to the Lawrence Warehouse Company at its warehouse at Greenwood, Mississippi, or at any other place . . . but did unlawfully, wilfully, feloniously and fraudulently appropriate said beer to his own use, contrary to Section 2118 of the Mississippi Code of 1942."

The crime charged is made criminal only by reason of the contract or agreement alleged in the indictment. The alleged contract was the special circumstance that would make the act criminal under Section 2118, Code of Mississippi of 1942. Section 2118 applies only when there is a contract or agreement. Hence it was necessary to allege the contract or agreement to make out the crime of embezzlement under the statute (42 C.J.S. Sec. 132, page 1024; *Bradford v. State*, 158 Miss. 210, 127 So. 277).

All material allegations in an indictment must be proven and there can be no conviction in the absence of such proof. (42 C.J.S. Sec. 244, page 1262; *U. S. v. Johnson*, 123 F. 2d 111; *State v. Stigler*, 179 Miss. 276, 175 So. 124.) The proof utterly failed to establish a contract or agreement as alleged in the indictment and the conviction cannot stand in law.

The trial court should have sustained defendant's motion to exclude the state's evidence and direct the jury to find him not guilty, made at the close of the state's evidence; should have sustained defendant's like motion made at the close of all of the evidence and should have granted defendant's request for a peremptory instruction. This conviction offends all sense of justice and should not be permitted to stand (*Rochine v. People of California*, 342 U. S. 165; *Leeper v. Texas*, 139 U.S. 462, 467; *Lisbena v. People*, 314 U.S. 219).

(b) THE PROOF SHOWS DEFENDANT CAME INTO POSSESSION OF THE PROPERTY UNLAWFULLY, HENCE COULD NOT BE GUILTY OF EMBEZZLEMENT AND REFUSAL OF COURT TO GRANT PEREMPTORY WAS A DENIAL OF DUE PROCESS.

The proof, without dispute, shows that neither the Warehouse Company or the bank, holding the warehouse receipts ever entered into any agreement to release the beer to defendant for exchange of new beer. The proof shows defendant came into possession of the beer unlawfully and without the consent of either the Warehouse Company or the bank.

Embezzlement is the wrongful appropriation or conversion of property where the original taking was lawful, or with the consent of the owner, while in larceny the taking involves a trespass and a felonious intent must exist at the time of such taking (*Jackson v. State*, 211 Miss. 828, 52 So. 2d 914). Here the taking was unlawful and the necessary and essential elements of embezzlement are wholly absent. The offense, if any, was larcency. The law does not permit one to be indicted for one offense and convicted thereof on evidence of another offense (*Talley v. State*, 174 Miss. 349, 164 So. 771). Yet that is exactly what was done here. It is difficult to conceive how there could have been a more complete departure from the established rules of criminal procedure than there was in this case. The methods used by the court in obtaining this conviction offend all sense of justice. In all such cases there has not been due process of law as required by the Fourteenth Amendment. As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. (*Lisbena v. People*, 314 U. S. 219, 62 S. Ct. 280, 290, 86 L. Ed. 166; *Brooks v. State*, 209 Miss. 150, 46 So. 2d 94; *Brown v. State of Mississippi*, 297 U. S. 278, 56 S. Ct. 461; *Caldwell v. Texas*, 137 U. S. 692; *Leeper v. Texas*, 139 U. S. 467.) We submit there has been in this case a denial of the constitutional rights of the defendant guaranteed by the Fourteenth Amendment.

3.

DEFENDANT WAS DENIED DUE PROCESS OF LAW, WHEN COURT GRANTED STATE'S INSTRUCTION NUMBER ONE THAT TURNED THE JURY LOOSE TO CONSIDER ANY EVIDENCE OF REMOVAL OF BEER FROM EITHER THE WAREHOUSE IN LELAND, WASHINGTON COUNTY, OR FROM THE WAREHOUSE IN GREENWOOD, LEFLORE COUNTY, THOUGH DEFENDANT WAS CHARGED ONLY WITH EMBEZZLEMENT IN LEFLORE COUNTY.

The indictment in this case charges the petitioner with the receipt of beer from the Lawrence Warehouse Company, a corporation, in Leflore County, Mississippi.

In addition to references throughout the trial to "beer", without distinguishing between the beer received in Leflore County and the beer received in Washington County, Mississippi, there were specific references by the District Attorney to "$50,000.00 worth of beer". These references include the beer received both in Washington County and Leflore County, Mississippi. Throughout the trial there was an intermingling of the affairs of the petitioner in Leland, Washington County, Mississippi, and in Greenwood, Leflore County, Mississippi. The documents in connection with the warehouse operation included those applicable to the Washington County warehouse as well as the Leflore County warehouse. Throughout the trial other references were made to the Washington County operation.

Under instruction Number One granted to the State, the jury were not directed to confine their determination of guilt or innocence to the matter of the beer received at the Greenwood warehouse in Leflore County, Mississippi. The instruction authorizes the jury to bring in a guilty verdict with relation to the beer received at the Leland warehouse in Washington County, Mississippi, a transaction for which petitioner was not indicted, but concerning which much testimony had been received.

Instruction Number One instructs the jury to bring in a guilty verdict based on the receipt by the petitioner of "one thousand or more cases of beer of the value of $1.50 or more per case of the property of said Lawrence Warehouse Company". The jury is not instructed that this beer must have been received in Leflore County, Mississippi, as the indictment charges.

There is so much testimony in the record in this case regarding the receipt by the petitioner of beer both in Leflore County and in Washington County, Mississippi, that the jury may well have thought that the issues to be tried by them related to any of the beer, regardless of the County where it was received by the petitioner. Their verdict in this case, under Instruction Number One for the State, could easily be based on the beer which the petitioner received in Washington County, Mississippi.

The issue before the jury, under the indictment brought in this case, was whether the petitioner was guilty of embezzlement of the beer received by him in Leflore

County, Mississippi. The issue submitted to the jury, under Instruction Number One for the State, was whether the petitioner was guilty of embezzlement of one thousand or more cases of beer received by him, regardless of the county of receipt.

"The rule that instructions are to be confined to the issues applies in criminal cases." 53 *Am. Jur.* page 454. Trial, Sec. 575.

In the case of *Waller v. State*, 103 Miss. 635, 60 So. 725, the indictment charged a forgery with intent to defraud Monsour. The instruction to the jury authorized a guilty verdict upon the proper finding that the forgery was with intent to defraud Ziller. In commenting on the instruction and reversing and remanding the case, the court said, page 726 of 60 So:

> "The pleader elected to set out in the indictment the name of a specific person whom the defendant was charged with having intended to cheat and defraud; and, this being true, it is manifest that the trial should have been confined to the charges preferred by the indictment. If the verdict of the jury had been an acquittal rather than a conviction, and the state had afterwards placed the defendant upon trial for forging and uttering the order with the intent to cheat and defraud the person named in the instruction, he would not be permitted to introduce and plead the former acquittal in bar of the second indictment."

The issue raised by the indictment and the plea of the petitioner was that of guilt or innocence of embezzling

beer received in Leflore County, Mississippi. The instruction to the jury authorized a guilty verdict for embezzling beer whether received in Leflore County, Mississippi, or elsewhere. The proper instruction to the jury would have confined their deliberations to the beer received in Leflore County, Mississippi.

If there had been no evidence in this case of the receipt by the petitioner of beer elsewhere than in Leflore County, Mississippi, the instruction could possibly be sustained on the ground that all the evidence was restricted to the receipt of beer in such county. However, as pointed out above, there were numerous references, and much testimony by both the State and the petitioner, regarding the receipt of beer by the petitioner from the Lawrence Warehouse Company in Washington County, Mississippi, as well as in Leflore County, Mississippi.

The positive tracing of the beer received in Leflore County, Mississippi, by the testimony of the witnesses, J. L. Jones, Walter Lee Jones, and Suber Roberts, Jr., should have convinced the jury that there was no fraudulent appropriations of the beer received in Leflore County, Mississippi, while the lack of information revealed to the jury about the disposition of the beer received in Washington County, Mississippi, might have led them to find a verdict of guilty based on the receipt of the Washington County, Mississippi, beer.

With the presence of testimony in the record relating to the receipt by the petitioner of beer both in Washsippi, the court should have instructed the jury that

their verdict was to be found with regard only to the beer received in Leflore County, Mississippi. The failure of Instruction No. One granted to the State to confine the issues to the fraudulent appropriation of the beer received in Lefore County, Mississippi, as charged in the indictment, is fatal error. The court erred in granting this Instruction Number One to the State.

This instruction was so unfair as to offend the common sense of justice. It was not confined to the issues of the case as the law requires and was an arbitrary exercise of the Court's power. Hence the Court's action violated the Fourteenth Amendment (*Leeper v. Texas*, 139 U. S. 462, 467).

We earnestly contend that this case is a proper one for the application of the Fourteenth Amendment. The defendant was not informed by the indictment of the nature of the charge against him. He was indicted for embezzlement on an alleged contract to release the beer from the warehouse for the exchange of the beer for new beer to be delivered back to the warehouse in its stead. Yet no contract or agreement was proven. He was indicted for embezzlement, yet there was no proof that he lawfully came into possession of the property. The refusal to grant the peremptory instruction was a distinct departure from the established law of criminal procedure. He was convicted and sentenced although as a matter of law, he should have been adjudged not guilty. The State of Mississippi, we submit, cannot deprive this defendant of equal and impartial justice under the law, without violating the provisions of the Fourteenth Amendment

(*Caldwell v. Texas,* 137 U. S. 692) for no one is permitted under that Amendment to subject a citizen of the United States to an arbitrary exercise of the powers of Government (*Leeper v. Texas,* 139 U. S. 462, 467). As applied to criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice (*Lisbena v. People,* 314 U. S. 219; *Brooks v. State,* 209 Miss. 150, 45 So. 2d 94; *Brown v. State of Mississippi,* 297 U. S. 278). All of the constitutional rights above mentioned, were ruthlessly disregarded and denied in this case.

This case is important not only to this defendant, who is facing a term of confinement in the Mississippi State Penitentiary unless rescued by this Court, but it is important also to all citizens who might be placed in similar circumstances in the future in the absence of a clear cut decision against it by this Honorable Court. If, as Justinian said: "Justice is the constant desire to render to every man his due," then certainly in this case there is abundant justification for the granting of a writ of certiorari to the Supreme Court of Mississippi for the review of the judgment in this case.

(i) There is appended to this petition as exhibit "A" a copy of the opinion of the Supreme Court of Mississippi, affirming the conviction and sentence.

(j) There is appended to this petition as exhibit "B" a copy of the judgment of the Circuit Court of Leflore County, Mississippi, and there is appended as exhibit "C" a copy of the judgment of the Supreme Court of Mississippi.

WHEREFORE, petitioner prays that this Honorable Court will grant a writ of certiorari to the Supreme Court of Mississippi for a review of the judgment in this case.

Respectfully submitted,

.....

MALCOLM B. MONTGOMERY,
414½ E. Capitol Street,
Jackson, Mississippi.

BARNETT, JONES & MONTGOMERY,
414½ E. Capitol Street,
Jackson, Mississippi.

STATE OF MISSISSIPPI,
HINDS COUNTY:

This is to certify that I, Malcolm B. Montgomery, counsel of record for Walter L. Davis, petitioner, have this day delivered to Honorable Joe T. Patterson, Attorney General of the State of Mississippi, a true and correct copy of the foregoing petition for certiorari.

Witness my signature this the .... day of November, 1956.

.....
MALCOLM B. MONTGOMERY.

STATE OF MISSISSIPPI,
HINDS COUNTY:

I, Joe T. Patterson, Attorney General of the State of Mississippi, do hereby acknowledge receipt of a true and correct copy of the foregoing petition for certiorari to be filed in the above styled cause.

Witness my signature this .... day of November, 1956.

.....
JOE T. PATTERSON,
Attorney General of the State of Mississippi.

EXHIBIT "A".

SUPREME COURT OF MISSISSIPPI.

June 11, 1956.

No. 40,150.

WALTER L. DAVIS,

versus

STATE OF MISSISSIPPI.

Defendant was indicted for embezzlement of a quantity of beer. From a judgment of conviction in the Circuit Court, Leflore County, Arthur Jordan, J., the defendant appeals. The Supreme Court, Arrington, J., held that the evidence sustained conviction and that the indictment was sufficient.

Affirmed.

1. Embezzlement key 44(1).

Evidence sustained a conviction for embezzlement of a quantity of beer. Code 1942, § 2118.

2. Embezzlement key 28, 32.

Indictment and information key 71.

In prosecution for embezzlement of a quantity of beer which defendant agreed to transport to another city and

exchange it for other beer and which defendant allegedly appropriated to his own use, indictment sufficiently described and contract under which the defendant obtained delivery of the beer, sufficiently described the property and sufficiently informed defendant of the acts made unlawful by the statute, and with which he was charged. Code 1942, § 2118.

Means Johnston, Porter W. Peteet, Greenwood, for appellant.

Joe T. Patterson, Asst. Atty. Gen., John H. Price, Jr., Asst. Atty. Gen., for appellee.

ARRINGTON, Justice.

Appellant was indicted for embezzlement under Section 2118, Mississippi Code of 1942. The trial resulted in a verdict of guilty, and appellant was sentenced to serve a term of five years in the penitentiary.

(1) The jury found upon ample proof that appellant, a beer dealer, obtained delivery from the Lawrence Warehouse Company of a quantity of beer under a contract or agreement that he would transport the beer to the Miller Brewing Company at Milwaukee, Wisconsin, and exchange it for other beer, and that upon making the exchange of the beer obtained from the warehouse company for new beer, he would return the new beer to the Lawrence Warehouse Company at Greenwood; that appellant did not transport and deliver the beer received from Lawrence Warehouse Company as he had agreed, and did not return the beer received, and did not return

to the warehouse company the new, or other beer; and that appellant appropriated the beer to his own use. Appellant received the beer under the agreement to return to Lawrence Warehouse Company the exchanged beer. His attempted explanation was that he caused the beer to be trucked to the Southern Barge Line at Memphis, Tennessee, for shipment to Miller Brewing Company, after having made arrangements with one Ike Stein, representative of the Southern Barge Line. He introduced bills of lading signed by Ike Stein and Joe Black. These bills of lading were made out on a form with the shipper's name printed thereon as Davis Motors, Inc., Memphis, Tennessee, a firm formerly operated by appellant. The bills of lading purport to show the shipment of over 9,000 cases of beer, the amount appellant received from Lawrence Warehouse Company, although appellant was indicted for embezzling only 1,000 cases.

According to his explanation, appellant did not know what became of the beer. The jury was justified in finding that there were no such persons as Joe Black and Ike Stein, and that the Southern Barge Line did not in fact exist. There is much confusion as to who trucked the beer to Memphis. There are numerous conflicts in the testimony of appellant, and the jury had good and sufficient grounds to find that appellant's whole story of the shipment of the beer to Miller Brewing Company was a fabrication. The State's proof was sufficient to show that Miller Brewing Company never agreed to exchange the old beer for new beer as appellant claimed, but appellant testified that he was a close friend of the President of the Miller Brewing Company, and that the latter agreed to allow the beer to be exchanged. The president of the

brewing company, with whom appellant claimed he made the exchange arrangements, was killed in an airplane crash shortly after the alleged arrangements were made.

(2) Appellant assigns several reasons why his demurrer to the indictment should have been sustained, all going to the proposition that the indictment did not properly inform the appellant of the nature and cause of the accusation, and that it did not set forth sufficient facts to prevent the application of the statute to any other acts than those made unlawful by the statute, and that no crime known to the law was charged. We think it was a good indictment. It sufficiently described the contract under which appellant obtained delivery of the beer, and that it sufficiently informed the accused of the nature of the accusation. The description of the property was sufficient. It sufficiently informed the accused of the acts made unlawful by the statute and with which he was charged. *State v. May*, 208 Miss. 862, 45 So.2d 728; *Hall v. State*, 166 Miss. 331, 143 So. 793; *State v. Ingram*, 166 Miss. 543, 146 So. 638.

We find no reversible error in the admission of testimony and the court properly instructed the jury.

A careful consideration of the entire record and the able briefs filed in behalf of appellant indicate that appellant was skillfully represented and received a fair and impartial trial. We find no error of record that would justify this Court in disturbing the verdict of the jury.

AFFIRMED.

McGEHEE, C. J., and LEE, ETHRIDGE and GILLESPIE, concur.

EXHIBIT "B".

MINUTE BOOK 13, PAGE 135.

MINUTES OF THE CIRCUIT COURT, LEFLORE COUNTY, MISS.

NOVEMBER TERM, 1955.

No. 17,539.

STATE OF MISSISSIPPI

versus

WALTER L. DAVIS.

This day came the District attorney on the part of the State, and the defendant, Walter L. Davis, in his own proper person, and by his attorneys, who having been arraigned at a former day of this Court on indictment charging him with EMBEZZLEMENT, and entered his plea of NOT GUILTY, thereto.

Whereupon came a jury of good and lawful men of said County, composed of W. M. Coppage and Eleven others who after having been duly elected, impaneled and specially sworn to try the issue joined, and after hearing all the evidence, arguments of counsel and receiving the instructions of the Court, retired in charge of John Ed Cothran, George W. Smith and E. L. Stowers, their sworn Bailiff's to consider their verdict, and after considering

the same returned into open Court in the presence of the defendant and his attorneys, the following verdict:

"We, the Jury, find the defendant guilty as charged."

Whereupon the defendant was brought to the Bar of the Court and asked if he had anything to say why the sentence of the Court should not be pronounced against him, says naught."

It is therefore ordered by the Court that for his crime of Embezzlement of which he now stands convicted that he be taken hence to the jail of Leflore County, there to remain until called for by the State Warden and by him conveyed to the State Penitentiary, there to remain for a period of Five Years.

EXHIBIT "C".

Monday, June 11th, 1956 Court Sitting:

No. 40,150.

WALTER L. DAVIS

versus

STATE OF MISSISSIPPI.

This cause having been submitted at a former day of this term on the record herein from the Circuit Court of Leflore County and this court having sufficiently examined and considered the same and being of the opinion that there is no error therein doth order and adjudge that the judgment of said Circuit Court rendered in this cause on the 1st day of December 1955—a conviction of embezzlement and a sentence to serve a term of 5 years in the State Penitentiary—be and the same is hereby affirmed. It is further ordered and adjudged that the State of Mississippi do have and recover of and from the appellant and W. M. Bell and Wm. P. Davis, sureties on the appeal bond herein, all of the costs of this appeal to be taxed, etc.

Minute Book "BL Page 217.